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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

FRANK WADE HOLLADAY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INTRODUCTORY STATEMENT

The Petitioner, Frank Wade Holladay, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, officially reported as *United States v. Holladay*, 566 F.2d 1018 (5th Circuit, 1978), handed down by the United States Court of Appeals for the Fifth Circuit on January 30, 1978. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is appended, bound with this petition and marked as Appendix "A".

Petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on May 8, 1978, and the Notice of the Order Denying Petition for Rehearing is appended, bound with this petition, and marked Appendix "B".

Petition for Stay of Mandate was filed by the Petitioner and the Stay was granted on May 16, 1978. The Mandate is stayed to and including June 7, 1978 pending the filing of this Petition and the Order is appended, bound with this Petition and marked Appendix "C".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit and the Order of said Court denying the Petition for Rehearing dated May 8, 1978.

Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. That the allowing by the trial judge of the United States Attorney to interject inflammatory and prejudicial language before the jury describing the Petitioner as a man of violence, and when such testimony had no pattern to connect same with the offenses charged but obviously was introduced by said attorney and acquiesced in by said trial judge, then in such event due process was denied instantaneously and the motion for mistrial should have been sustained, and failure to do so is cause for reversal.

2. The Motion for Severance which was denied by the lower court prejudices the Petitioner such that the conviction must be overturned.

3. The Government failed to meet its burden of proof as to counts 3 and 4 of the indictment and the District Court erred in failing to instruct the jury to return a directed verdict for the Petitioner as to those counts.

4. The Exhibits 5(a) and 5(b) were admitted into evidence in violation of the Federal Business Records Act, Title 28 U.S.C.A., Section 1732 (a); and admitting these records violated the rights of the Petitioner such that the conviction must be overturned.

5. The Government failed to prove that the Petitioner carried on a retail liquor and/or beer business in violation of the Federal Statute as contained in Counts 1 and 2 of the indictment and the district court's failure to grant a directed verdict should be overturned.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional provisions which are relevant to the decision of this case are the Fifth and Sixth Amendments of the United States Constitution.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against themselves, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE AND FACTS

Petitioner, Frank Wade Holladay, was indicted by a Federal Grand Jury in the Northern District of Mississippi on a four-count indictment. Count 1 charged Petitioner with unlawfully and knowingly carrying on the business of a retail liquor dealer who did willfully fail to pay the special taxes required by law in violation of Section 5691(a) of Title 26 of the United States Code. The period of such activity was cited as January 1, 1972, to on or about June 20, 1974. Count 2 of the same indictment charged during the same period of time and under the same Section of Title 26 of the United States Code that Petitioner did similarly carry on the business of a retail beer dealer who did willfully fail to pay the special taxes required by law. Count 3 of the indictment charges the Petitioner with willfully and knowingly making and subscribing and causing to be made and subscribed a United States individual income tax return, Form 1040, for the calendar year 1972 which was verified by a written declaration applicable to the penalties of perjury and filed with the Internal Revenue Service. The Petitioner is charged with not believing the tax returns to be true and correct as to every material matter in that said return reported gross receipts in the amount of $27,557.79, whereas

Petitioner was charged with then and there well knowing and believing he had received substantial gross receipts in addition to that amount, all in violation of Section 7206(1) of Title 26 of the United States Code. This offense was alleged to have occurred on or about June 18, 1973. Count 4 of the indictment charges the Petitioner similar to Count 3 with the exception that the date charged for the offense is on or about April 15, 1974, the calendar year involved being 1973, and the amount shown on the return was gross receipts in the amount of $41,458.43.

Petitioner was tried before a jury in Oxford, Mississippi, on February 7 through February 11, 1977. Petitioner was arraigned on November 23, 1976. On January 3, 1977, a hearing was held on Petitioner's Motion for Severance of Counts One and Two involving violation of Section 5691(a) of Title 26 of the United States Code. The Motion for Severance of Counts was overruled by Order entered the 11th day of January, 1977. On January 28, 1977, a hearing was held as to the Motion to Suppress previously filed by the Petitioner, as well as the Government's Motion requiring the Defendant to furnish handwriting and handprinting exemplars. The Court overruled the Motion to Suppress and sustained the Government's motion requiring defendant to furnish exemplary writings.

During the course of the trial, the Government requested that three (3) witnesses be called by the Court; this was accomplished, but only two of them could be found. Court witness Clyde Tackett had previously testified in the United States v. Umfress which had previously been tried before Judge Smith in Aberdeen on February 14, 1975. Mr. Tackett had also testified before the Grand Jury which returned the indictment against Petitioner. This occurred on November 8, 1976. During the course of its examination of Mr. Tackett, the attorney for the United States Government verified through Mr.

Tackett that he had committed perjury at the Umfress trial and went further forward to question him regarding his Grand Jury testimony and, particularly, his fears regarding Petitioner. In questioning Mr. Tackett, the Government attorney read to Mr. Tackett in the presence of the Jury certain statements of Mr. Tackett from his Grand Jury appearance which Mr. Tackett confirmed. Said statements related to Mr. Tackett's fear of physical violence arising from the Petitioner. Subsequent to this testimony, Petitioner's counsel moved to strike the testimony of Clyde Tackett and this was overruled. Thereafter, the Petitioner's counsel moved for a mistrial which was overruled.

The United States Government offered numerous witnesses who testified as to Petitioner's activity regarding beer and whiskey sales at the Deep Rock Station. The Government's proof further showed that the utilities at said station were in the name of the Petitioner, and testimony was offered to show the existence of unlawful gambling activity at this location. Only one Government witness testified as to the gross receipts of the Petitioner and this testimony was based solely upon two notebooks which were seized at the station and which allegedly contained certain notations which, according to testimony, were made by the Petitioner and others. One Government witness testified regarding the contents of these notebooks and the alleged significance of the entries therein. At the conclusion of the case of the prosecution, Petitioner moved for a directed verdict as to all counts of the indictment. This was overruled. At the conclusion of the trial, the Petitioner was found guilty on all four counts. Thereafter, a Motion for New Trial was overruled at the date of sentencing, March 11, 1977.

REASON FOR GRANTING THE WRIT

We believe this case furnishs the Court distinct and insurmountable issues to be resolved in order to protect constitutional rights of the Petitioner herein.

The Petitioner takes the position in Point I of the Argument that a Defendant is entitled to a fair and impartial trial by jury without the prejudicial effect of improper testimony, and testimony that is inflamatory in nature. There was certain testimony elicited from a witness who was known or should have been known to be a perjurer to the Court and to the United States Attorney. The testimony of this witness, along with the reading to the jury of a transcript of prior proceedings by the United States Attorney, which dealt with the witness' fear of bloodshed by the Petitioner, was highly prejudicial and caused Petitioner to be denied the benefit of a fair trial; the trial Court erred in not sustaining the objections to testimony and thereafter further erred in denying a mistrial as a result of this prejudicial material.

The Petitioner's Point II of the Argument addresses the issue that the Petitioner's rights were prejudiced by being tried on all four counts of the indictment in one trial. The charges were unrelated in nature, two being the failure to pay Federal tax on alcoholic beverages, and two counts being the wilful false filing of the Federal Income Tax Form. The charges require different types of proof to warrant a conviction. With the vast amount of proof necessary, and the presentation of so much unrelated material, the jury was confused to the point that it was unable to keep the evidence orderly within its own mind. In view of the evidence of two different types of charges coupled with repeated interjections of criminality not charged, it was fatally prejudicial to the Petitioner to be prosecuted on all four counts of the indictment in one trial.

Point III argues that the prosecution failed to meet the burdent of proof as to the counts relating to the alleged false swearing to Form 1040 in that the evidence produced at trial failed to show that the Petitioner had at any time received any income or gross receipts from any source other than those reported on his income tax return. Although the evidence did show that the Petitioner purchased beer and whiskey on several occasions, there was no proof offered as to the Petitioner's receiving any benefit from the sale of these beverages. There was proof that the Petitioner made certain entries in the notebooks, Government Exhibits 5(a) and 5(b), but there was no linking of any gross receipts or income to the Petitioner.

Point IV of the Argument states the Government Exhibits 5(a) and 5(b), were not properly introduced as business records as required by the Federal statutes. They did not relate to the business run by the Petitioner and there was no proper predicate laid connecting the alleged business record to the Petitioner. The Petitioner timely objected to their introductions, the overruling of which was in error.

The last point of the argument states that while there is evidence indicating that the Petitioner did own the Deep Rock Station, it was leased and there was no direct evidence showing that Petitioner conducted a business which would have warranted a prosecution under the Federal statutes as to not paying an alcoholic beverage license tax, and that the failure to grant a directed verdict as to the counts 1 and 2 of the indictment was an error on the part of the district court.

ARGUMENT

I

A review of the record in the Lower Court reveals the following testimony, prompted by the United States Attorney.

> "Q. Is it not true, Mr. Tackett, that you testified to the Grand Jury the reason you didn't tell the truth at the Umfress case on certain points, weren't you asked before the Grand Jury, 'Mr. Tackett, are you fearful of Mr. Holladay', and your answer was, was it not, 'He is the type of fellow that it wouldn't do to fool with much'; isn't that what you said?
>
> A. Yes, sir.
>
> Q. Were you not asked by the Grand Jury Foreman this question: 'You didn't give a real direct answer about whether you would be fearful of your safety'——
>
> Mr. Tollison: Your Honor, we object to all of this. It is prejudicial, that particular kind of questioning.
>
> The Court: The objection is overruled.
>
> By Mr. Hailman:
>
> Q. 'Do you think by testifying against Mr. Holladay that you could very easily put yourself in a position to be subject to some injury', and was it not your answer, 'Well, I would think so; it is possible'.
>
> A. (indicating in the affirmative.)
>
> Q. And did not the Foreman of the Grand Jury ask you 'Do you know of cases in the past where similar things have occurred', and you said, 'I don't know their names, but

there has been times when come to what they say, bloodshed', is that not your testimony?

A. Yes, sir."

The above testimony was not only elicited by the Government, but was read partially by the United States Attorney. In spite of objection by the Defense counsel, the testimony indicating that the Petitioner was a man of violence stood uncorrected. Therefore, the Petitioner was prejudiced as to his chances for a fair and impartial trial which is in clear violation of his Fifth and Fourteenth Amendment rights.

This type of evidence introduced in this case tends to create hostility and confusion of the issues within the minds of the jurors, and far outweighs its value in proving in any manner whatsoever, the offenses with which the Petitioner was charged, *U.S. v. Klein* (D.C.N.Y. 1955) 131 F.Supp. 807.

It is important for this Court to note that this witness's (Tackett's) testimony had been objected to by the Petitioner's attorney in the trial below. Furthermore, this witness testified differently at the Grand Jury hearing and the Petitioner did not know of the prior testimony until trial.

What we have here are the salient facts that the United States Government knew, or had every reason to know, of the prior inconsistencies of this witness. The United States Government was on notice that this witness, in particular, was a perjurer. A mistrial should have been granted as requested by the Petitioner.

There is no question that a conviction, obtained in a United States District Court in a criminal trial, will not stand on evidence which is in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, citing *Mooney v. Holohan*, 294 U.S. 103 (1935):

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Herbert v. Louisiana*, 272 U.S. 312, 316, and 317. It is a requirement that cannot be deemed to be satisfied by mere notice and herein if a State contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of like result by intimidation." At Page 112.

The Mooney doctrine of the law has been followed and broadened by other cases to bring in the issue of credibility of the witness. In 1959, in the case of *Napue v. Illinois*, 360 U.S. 264, 269, the Court stated as follows:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *Peoples v. Savvides*, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854-855;

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

In *Hammond v. U.S.*, 309 F2d 935 (CA 4 1962), at page 936, the Court once again enforced this basic legal point by stating as follows:

"Knowing use of perjured testimony by the prosecution authorities, if sufficiently alleged, taints a conviction obtained therefrom and is a good ground for post conviction relief (see case for list of authorities)."

In the case of *Gigilio v. U. S.*, 405 U.S. 150 (1972), wherein there was new evidence discovered after the trial and certiorari was granted, to determine whether there was need for a new trial the Court stated as follows:

"As long ago as Mooney v. Holohan . . . this court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'." At page 153.

The rule, as originally stated, was broadened in the decision of *U. S. v. Vincent*, 525 F2d 262 (CA 2 1975), to include testimony that is not solicited by the state, but merely allowed to stand uncorrected is a violation of the due process clause of the Fourteenth Amendment. In the case at page 267 the Court stated as follows:

"We have come to the conclusion that the District Judge's decision must be reversed. The knowing use by a state

prosecutor of the perjurer testimony ordinarily results in deprivation of fundamental due process, violating the 14th Amendment and requiring a new trial . . . Whether the state solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle . . . nor does the rule lose force because perjury reflects only upon the credibility of the witness. A conviction obtained through the use of testimony known by the state to be untrue must fail if

> the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . or if the false testimony used by the State in securing the conviction of petitioner may have held an effect on the outcome of the trial."

The Court in the above cited case relied upon the prior decisions in *Mooney v. Holohan, Napue v. Illinois, Gigilio v. U. S.*, supra.

In 1976, there were a number of cases decided that upheld the legal precedent originally established in the *Mooney v. Holohan*, supra. These recent cases once again state that, where there is perjured testimony that may have the possibility of effecting the outcome of a case, then the conviction must not stand, regardless of the good faith of the prosecutor.

This point is illustrated by the case of *U. S. v. Warden Cannon*, 538 F2d 1272 (CA 7 1976), which cited on 1276-1277 that the standards set in the cases of *Mooney, Napue* and *Pyle v. Kansas*, all cited herein with the exception of the Pyle case, must apply.

In the case of *U. S. v. Pollock*, 417 F.Supp. 1332 (D.C. Mass. 1976), the Court stated the following in the use of false or perjured testimony:

"The impropriety of knowingly using false or perjured testimony in the conduct of a trial fundamentally subverts the role of the judiciary as an engine in search of the truth." page 1348

In another case decided as recently as September, 1976 the rule as hereinabove stated was again re-enforced and the Court stated as follows in the case of *Welcome v. Vincent*, 418 F.Supp. 1088 (S.D.N.Y. 1976):

"Petitioner is entitled to a federal writ of habeas corpus voiding the state court judgment of conviction only upon showing that the state contrived to deprive him of his right to a fair trial, protected under the due process clause. The deprivation of that right is not established by a mere showing that petitioner's conviction may have been the result in part of perjury by a prosecution witness, unknown to the prosecutor. It is the deliberate knowing, or even the negligent use' of false testimony by the prosecution, or the supression of evidence favorable to the defendtnt, which so offends the 'rudimentary demands of justice' that it deprives an accused of his right to a fair trial, and taints his conviction." Page 1093

In the case of *Boone v. Paderick*, 541 F.2d 447 (CA 4, 1976), the Court upheld the position taken in the case of *Gigilio*, supra, that the false testimony could in any reasonable likelihood have effected the judgment of a jury, then a new trial is required.

The United States Supreme Court has never taken this question lightly, especially where there is a probability of the denial of due process resulting in a lack of a fair trial. Speaking to the fundamental fairness doctrine:

"We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. Connecticut, 375 U.S. 85, 86-87 11 L.ed.2d 171, 173, 84 S.Ct. 229 (1963).

This then is the guideline by which prejudicial information, placed before a jury, has to be weighed. In the present case, Petitioner, accused of swearing falsely to a Form 1040 and of selling at retail, liquor and beer, without the proper Federal tax provision having been made, was blantantly characterized as a man inspiring fear and violence in those shown to have been knowledgeable of him. No overt acts were included in this testimony, rather it was a generalized characterization which, being totally out of place in this prosecution, could only be construed to have strongly prejudiced the Petitioner in the area of fundamental fairness.

We further note that the Defendant had not put his character in issue and such comments directed expressly to his general character and reputation, were certainly improper. *U. S. v. Crawford* (CA 8, 1971), 428 F2d 441. A United States Attorney must and should guard against doing or saying anything that would prejudice the minds of the jurors and tend to cause them to decide a case on anything other than the admissible evidence. The issue in the case before this Court was whether or not Petitioner had committed those acts charged in the indictment and not whether he was a violent person who incited fear of bloodshed in those around him. That the jury was not touched by the poisonous fangs of prejudice by the inclusion of this evidence is highly doubtful . . . As the Supreme Court stated in *Chapman v. California*, supra, referring to whether or not constitutional error could be held harmless:

"We, therefore, do not more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless

beyond a reasonable doubt." 386 U.S. 18, 24, 17 L.ed2d 704, 710-711, 87 S.Ct. 824.

Petitioner respectfully contends that the testimony, which was allowed in the District Court and upheld by the Fifth Circuit Court of Appeals regarding his alleged propensity for violence and bloodshed, was sufficiently prejudicial to the Petitioner, so that he was denied a fair and impartial trial and, as such, was denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

II

Prior to trial, the Petitioner filed a Motion to sever the causes for the purpose of trial of the four counts against him. The reasoning behind this Motion was the evidence tending to prove Counts 1 and 2 was not associated or required in the proof of Counts 3 and 4. The co-mingling of this evidence would tend to place prejudicial effects upon the Petitioner's shoulders in the eyes of the jury. This Motion was denied and the trial jury was allowed to hear a mixed bag of evidence, which bolstered the Governments version of the Petitioner's alleged gross receipts but was so prejudicial to the Petitioner that his opportunity for a fair and impartial trial on Counts 1 and 2 was removed. The jury was exposed to a variety of prejudicial information regarding multiple alleged acts of a criminal nature, and for a trial period of four days a pervasive air of criminality prevailed over the Petitioner. At no time during the trial of this matter did the Government confine its testimony to the crimes as charged, but took a scatter-gun technique in showing evidence of whiskey, slot machines, dice game, and placing money and dice at the Petitioner's home, before the jury.

Testimony at random was elicited to bring to the juror's attention these matters with no overt attempt made to connect them to a common plan or scheme. In this particular arena,

with its showing of so many bad things at one time all heaped upon the shoulders of one man, to say that there was not prejudice in such a joinder is unrealistic. *United States v. Ragghianti* (CA 9 1975) 527 F2d 586.

On this point one of the leading cases is *Bradley v. United States* (CA DC 1969) 433 F2d 1113 which states:

> "Few doctrines are more firmly established than the 'principle of long standing in our law that evidence of one crime is inadmissible to prove *disposition* to commit form which the jury may infer that the defendant committed the crime charged.'
>
> "As we have demonstrated, '[s]ince the likelihood that juries will say such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose.' By the same token 'criminal propensity' prejudice will require separate trials of joined offenses where to each its own evidentiary details must be confined." 433 F2d 1117-1118.

And from *Drew v. United States* (CA DC 1964), 331 F2d 85, we find:

> "The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded on presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less

tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one . . .

"The Federal Courts, including our own have, however, found no prejudicial effect from joinder when the evidence from each crime is simple and distinct even though such evidence might not have been admissible in separate trials under the rules just discussed. This rests upon the assumption that, with a proper charge, the jury can easily keep such evidence separate in their deliberation, and therefore, the danger of the jury cumulating the evidence is substantially reduced." 331 F2d 88, 91.

It may readily be seen from the above that were there two separate and simple offenses as is idealized in joinder under Rules 8(a) and 14(a), there would have been no problem of the jurors maintaining separation of the offenses charged here; but in the case at bar this was certainly not the situation. Rather there was an extremely complex gathering of criminal indicia by the United States Attorney which militated to the prejudice and ultimate detriment of the Petitioner.

For these reasons the Petitioner respectfully suggests review and requests that the judgment of the Fifth Circuit Court of Appeals and the District Court be overturned.

III

Although there was much evidence given by various witnesses for the Government as to the activities at the Deep Rock Station, the Government wholly failed to establish that the Petitioner received any income from the operations of the Deep Rock Station other than as to rent which he did properly report on his income tax return.

No one stated that the income from the service station went to the Petitioner at any time. The record is totally devoid of any direct linkage of the Petitioner, and his income, to the illicit activities which were conducted at the Deep Rock Station.

The testimony of Federal Bureau of Investigation Agent Baker indicated merely certain gross income figures for that operation based upon his interpretation of Exhibits 5(a) and 5(b). The handwriting expert, by the use of the same exhibits, mentioned above, testified that some but by no means all of the entries in the exhibits had been made by the Petitioner.

There is also no showing that the gross receipts, allegedly indicated as emanating from the Deep Rock Service Station operation, were a material item as to the Petitioner. There is abundant inference of criminal activity alleged to have been conducted on those premises, but this in and of itself is not sufficient to show the materiality of the gross receipts of the Deep Rock Station vis-a-vis the forms 1040 of this Petitioner. It has been held that:

"Under § 7206 (1) the test of materiality is whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly'." United States v. Rayor, 204 F.Supp. 486, 491 (S.D. Cal. 1962). As quoted in U.S. v. Null (4th Cir. 1969), 415 F.2d 1178, 1181.

There was no showing whatsoever of the requisite mental attitude engendering intent on the part of the Petitioner at the time of the filing of the alleged incorrect returns. This is a necessary element of proof and was totally omitted. *United States v. Cohen*, 481 F2d 840 (CA 8 1973), *United States v. DeVarco* (CA 7 1972) 484 F2d 670.

There were numerous methods by which the prosecution could have attempted to establish a violation which would go to the conviction of Petitioner under Counts 3 and 4. These

would include a showing of unexplained expenditures of large amounts of money; it would be material to show that the Petitioner had paid off large amounts of indebtedness or acquired large amounts of property which would tend to show that he had unreported income. However, in the Lower Court this was not done. If there could have been shown a consistent pattern of underreporting large amounts of income by Petitioner, this might have been used as a method of securing a conviction. *Escobar v. United States* (CA 5 1967), 388 F2d 661.

Petitioner would concede that it is not necessary that the Government adduce evidence of a deficiency in order for there to be a conviction to stand under Section 7206(1) of Title 26, U.S.C. *United States v. Miller* (CA 5, 1974) 491 F2d 638. However, merely because it is not necessary to produce direct evidence of deficiency, there must be some overt showing that there has been a material misstatement in order that there can be thereby a false swearing. It is the position of Petitioner that the proof offered was insufficient to support conviction on Counts 3 and 4. An examination of the evidence, relating to Counts 3 and 4 charged in the indictment, reveals that it is charitable at least to describe the Government's proof as highly circumstantial and there is no evidence whatsoever linking the returns of Petitioner for the years in question, to the supposed gross receipts of the Deep Rock Station. The Fifth Circuit had adopted a standard for review which applies directly in this case as to whether

> "reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence." United States v. Ragano (CA 5, 1975), 520 F2d 1191 at 1203 Note 16.

Had such been applied here without the voluminous extraneous evidence of other activity, it cannot be held that Petitioner has been proven guilty of the offenses charged under Counts 3 and 4 of the indictment.

For the above and foregoing reason, Petitioner feels review of the Fifth Circuit Court of Appeals and the District Court's decisions, is in order, in the interest of justice as to Counts 3 and 4 of the indictment.

IV

A review of the record indicates, the Government attempted to build a case of circumstantial evidence as to Counts 3 and 4 of the indictment against the Petitioner, based upon Exhibits 5(a) and 5(b), the same being two spiral notebooks which were seized at the Deep Rock Service Station pursuant to a search warrant issued to find evidence of violation of whiskey and beer sales without the proper Federal tax adherences.

These items were introduced, over the objection by Petitioner's counsel, as part of the items seized at the time of the execution of the search warrant. Later in the trial, there was extensive testimony by the Federal Bureau of Investigation expert, Samuel Baker, from these spiral notebooks in which he equated the totality of figures therein to being gross receipts for the years 1972 and 1973 in excess of $100,000.00 for each year. He did admit that this did not take into consideration any costs of sale or other expenses. He further testified that these figures, being in excess of $100,000.00 each for the years 1972 and 1973, were not shown on the income tax returns of the Petitioner for those respective years. This testimony was elicited without any showing, whatsoever, that these documents fell into the exception to the hearsay rule known as Federal Business Records Act, found in Title 28, United States Code, Section 1732(a).

It is the contention of Petitioner that there was no proper predicate laid prior to the introduction of these notebooks as exhibits at his trial, which would justify their being relied upon and testified to, as an exception to the hearsay rule as noted

hereinabove. This Court has very specifically ruled upon the three tests which must all be met for allowing admissibility of such records:

> (1) The records must be kept pursuant to some routine *procedure* designed to assure their accuracy.
>
> (2) They must be created for *motives* that would tend to assure accuracy (preparation for litigation, for example is not such a motive).
>
> (3) They must not themselves be mere accumulations of hearsay or uninformed opinion. *United States v. Ragano* (CA 5, 1975) 520 F2d 1191 at page 1200 quoting from *Sabatino v. Curtiss National Bank* (CA 5, 1969) 415 F2d 632 at 637. (Emphasis in original).

The methodology behind these bookkeeping entries, if such they were, was never explained to the jury. The handwriting expert who testified for the Government stated that there were several different hands which had prepared these documents. In short, none of the three tests stated above was met by the Government, much less all three, which would have allowed the admissibility and the reliance by the jury upon the information contained in these documents. The Petitioner timely objected to their introduction and this objection was overruled and they were admitted.

For the above and foregoing reasons, Petitioner respectfully states that his conviction as to Counts 3 and 4 of the indictment was erroneous and must be overturned.

V

The showing in the District Court by the Government as to Counts 1 and 2 of the indictment were to the effect that beer and whiskey were both sold on the premises of Deep Rock Station. It was also brought out that Petitioner was the owner

of the Deep Rock Station and that in a separate portion of the building from the Service Station, which was not connected by any common portal, he did operate a used car business from time to time. There was further evidence to show that he had upon occasion purchased quantities of beer and liquor, but there was no direct evidence linking those purchases to retail sales allegedly made at the Service Station. Only one witness testified that Petitioner had sold him some beer at the Station and this was not shown to be a regular and sustained course of action by Petitioner. There was no showing by the Government witnesses that the Petitioner was the manager or master mind behind the sale of beer and whiskey at the Deep Rock Station. There was no testimony or evidence elicited that there was any retail sale of beer or whiskey at any location other than the Deep Rock Station by the Petitioner.

The gravamen of this offense charged under these two counts of the indictment is the continual and regular carrying on of the business of being a retail dealer in these alcoholic beverages. *U. S. v. Cladianos* (CA Nev. 1976), 532 F2d 130. Further, there was no showing of any willfulness on the part of the Petitioner in the Court below. Such is an essential element of this offense. *U. S. v. Curry* (CA Wash. 1970), 428 F2d 785.

The testimony and evidence showed merely that the Petitioner did stop by the service station occasionally, that he owned the premises and that the telephone and lights were in his name, but the business was in the name of someone else. Through implication, the Government attempted to show some suspicious circumstances regarding the fact that witnesses stated there was no written lease between Petitioner and the operator of the service station. Such is not a requirement under Mississippi law.

Taking the evidence as to this point in a light more favorable to the prosecution, it is the position of Petitioner that such does not rule out in the minds of reasonable men the hypoth-

esis of the innocence of the Petitioner as to Counts 1 and 2 of the indictment. *U. S. v. Fox* (CA 5, 1976), 530 F2d 1258.

Thus it is the contention of Petitioner that failure to direct a verdict for the Petitioner on Counts 1 and 2 of the indictment was error and the conviction as to those Counts should be overturned.

CONCLUSION

Petitioner respectfully submits that a review of the record and the appendices attached hereto would indicate that this Petition for Writ of Certiorari should be granted, and the judgment of the Lower Court and the Fifth Circuit Court of Appeals which affirmed the judgment of the Lower Court should be set aside and the judgments of conviction reversed.

Respectfully submitted,

ALVIN M. BINDER
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
Attorney for Petitioner

Certificate

The undersigned counsel for Petitioner certifies that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari have this day been mailed by United States Mail, postage prepaid, to Honorable Alfred E. Moreton, III, and Honorable John R. Hailman, Assistant United States Attorney, Post Office Box 886, Oxford, Mississippi 38655, attorneys of record for the United States Government.

This the 2nd day of June, 1978.

Alvin M. Binder

APPENDIX

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frank Wade HOLLADAY,
Defendant-Appellant.

No. 77-5189

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

Jan. 30, 1978.

Defendant was convicted in the United States District Court for the Northern District of Mississippi, at Oxford, Orma R. Smith, J., of income tax violations, and he appealed. The Court of Appeals held, inter alia, that defendant's convictions were supported by the evidence.

Affirmed.

1. Criminal Law Key 706(2)

Prosecution was not guilty of presenting testimony known to be false merely because it presented prosecution witness who had testified differently in the past.

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* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

2. Criminal Law Key 1038.2
Witnesses Key 396(1)

Where, after prosecution witness had been vigorously cross-examined about his prior inconsistent testimony favorable to accused, statement was elicited from him on redirect that he had testified differently in the past because he was afraid of defendant, and where such statement was not elaborated but was limited to what was necessary in order to counter implication that present testimony was not to be believed, such evidence was admissible as bearing on issue which had been injected by defense, probative value of evidence was not substantially outweighed by danger of unfair prejudice, and court's failure to give special instruction was not plain error. Federal Rules of Evidence, rules 403, 404(b), 28 U.S.C.A.

3. Criminal Law Key 618

Where all four counts of indictment against defendant for violation of income tax statutes were based on gambling and bootlegging operation conducted at defendant's service station, trial court did not abuse its discretion in denying defendant's motion for severance. 26 U.S.C.A. (I.R.C.1954) §§ 5691(a), 7206(1).

4. Internal Revenue Key 2451.6

Defendant's liability for filing false income tax returns was established by evidence that defendant failed to report substantial gross receipts from gambling and bootlegging operations conducted at his filling station. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

5. Internal Revenue Key 2408

In prosecution for filing false income tax returns, element of willfulness was evidenced by defendant's use of false names in

connection with conduct of gambling and bootlegging operations at his service station, and by defendant's surreptitious reliance on use of cash. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

6. Internal Revenue Key 2454

Conviction for violation of statute requiring payment of special tax by persons dealing in liquors was supported by evidence that, whether or not defendant ordered illicit liquor sales at his service station, he directly participated in them through his ownership of premises knowing that they were being used for such sales, by concealing portion of station's supply in his automobile, and by reselling on one occasion. 26 U.S.C.A. (I.R.C. 1954) § 5691(a).

7. Criminal Law Key 434

In prosecution for violation of income tax laws, notebooks seized at defendant's service station were properly admitted on showing that they themselves demonstrated that they were part of single-entry bookkeeping system continuously maintained for purpose of accounting for receipts and disbursements of defendant's business. 26 U.S.C.A. (I.R.C1954) §§ 5691(a), 7206 (1); Federal Rules of Evidence, rules 803(6), 901, 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Mississippi.

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.

PER CURIAM:

[1] A prosecution witness who had testified differently in the past was introduced by the prosecution: It was not improper for the prosecution to offer this testimony. Presentation of a witness

who recants or contradicts his prior testimony is not to be confused with eliciting perjury. It was for the jury to decide whether or not to credit the witness. There is no evidence that the prosecution knew or believed the trial testimony to be untrue; hence, the conviction was not obtained by the presentation of testimony known to be false. Cf. *Napue v. Illinois*, 1959, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217.

[2] After this witness had been vigorously cross-examined about his prior inconsistent testimony favorable to the accused, a statement was elicited from him on redirect that he had testified differently in the past because he was afraid of the defendant. The statement was not elaborated; it was limited to what was necessary in order to counter the implication that the present testimony of the witness was not to be believed. Because the issue had been thus injected by the defense, the evidence was admissible. Rule 404(b), Federal Rules of Evidence. Under the circumstances, its probative value was not substantially outweighed by the danger of unfair prejudice. Rule 403 Id. No special instruction was requested, and the court's failure to give one was not plain error. *United States v. Tramauti*, 2d Cir. 1975, 513 F.2d 1087.

[3] The denial of the motion for a severance is not grounds for reversal. ". . . [I]t is axiomatic that the granting of a severance is within the discretion of the trial judge . . . The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review. . . . The defendant must show something more than the fact that a 'separate trial might offer him a better chance of acquittal.' " *U. S. v. Pacheco*, 5 Cir. 1974, 489 F.2d 554, 561. All four counts were based on a gambling and bootlegging operation at defendant's service station. Under these circumstances, there was no abuse of discretion.

[4, 5] Although the government did not prove that the defendant received profits or income from the illicit business at his gas

station, it did establish, through direct testimony and the gas station notebooks, substantial gross receipts that he failed to report. This material misrepresentation suffices to establish liability for filing false returns, 26 U.S.C. § 7206(1). *U. S v. Morse*, 2d Cir. 1974, 491 F.2d 149; *U. S. v. Jernigan*, 5 Cir. 1969, 411 F.2d 471, cert. denied, 396 U.S. 927, 90 S.Ct. 262, 24 L.Ed.2d 225. The element of willfulness was evidenced by a number of probative circumstances, including the defendant's use of false names and his surreptitious reliance on the use of cash. *U. S. v. Stone*, 5 Cir. 1970, 431 F.2d 1286, 1288.

[6] There was also sufficient evidence with respect to the alleged violations of 26 U.S.C. § 5691(a), which requires payment of a special tax by persons dealing in liquors. The defendant purchased, under pseudonym, wholesale quantities of liquor and frequently endorsed checks received for them at his service station. Whether or not he ordered the illicit liquor sales at his service station, he directly participated in them through his ownership of the premises knowing they were being used for these sales, by concealing a portion of the station's supply in his automobile and by reselling on one occasion. See *Hale v. U. S.*, 5 Cir. 1945, 149 F.2d 401, cert. denied, 326 U.S. 732, 66 SCt. 40, 90 L.Ed. 436.

[7] With respect to admission of the notebooks seized at the gas station, "we begin . . . with the proposition that federal law favors the admission of probative evidence. In fact, '(t)he Federal Rules and practice favor admission of evidence rather than exclusion if the proffered evidence has any probative value at all.' . . . Doubts 'must be resolved in favor of admissibility.' " *Sabatino v. Curtiss National Bank of Miami Springs*, 5 Cir. 1969, 415 F.2d 632. The notebooks themselves demonstrate that they are a part of a single entry bookkeeping system continuously maintained since 1967 for the purpose of accounting for the receipts and disbursements through the gas station and satisfy the requirements of *U. S. v. Ragano*, 5 Cir. 1975, 520

F.2d 1191. The trial court did not abuse its discretion in admitting them either under Rule 803(6) or Rule 901 of the Federal Rules of Evidence.

AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 77-5189
Summary Calendar
D. C. Docket No. 76-118-S-CRW

United States of America,

Plaintiff-Appellee,

versus

Frank Wade Holladay,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Mississippi

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

January 30, 1978

ISSUED AS MANDATE:

APPENDIX "B"

United States Court of Appeals
Fifth Circuit
Office of the Clerk

May 8, 1978

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 77-5189—U.S.A. v. Frank Wade Holladay

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.
See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
/s/ By CLARE SACHS
Deputy Clerk

cc Mr. Alvin M. Binder
Messrs. H. M. Ray
John R. Hailman
Aifred E. Moreton, III

APPENDIX "C"

In the United States Court of Appeals
for the Fifth Circuit

No. 77-5189

United States of America,

Plaintiff-Appellee,

versus

Frank Wade Holladay,

Defendant-Appellant.

ORDER

(Filed May 16, 1978)

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(x) The motion of Appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including June 7, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court, denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ (Illegible)
United States Circuit Judge